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MAJLIS PERBANDARAN AMPANG JAYA

v.

STEVEN PHOA CHENG LOON & ORS

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FEDERAL COURT, PUTRAJAYA
STEVE SHIM CJ (SABAH & SARAWAK)
ABDUL HAMID MOHAMAD FCJ
ARIFIN ZAKARIA FCJ
[CIVIL APPEAL NO. 01-4-2004 (W)]

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17 FEBRUARY 2006

TORT: *Damages - Negligence - Immunity under s. 95(2) Street, Drainage and Building Act 1974 - Economic loss - Liability of joint tortfeasors - Public law*

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Blocks 1,2 and 3 of The Highland Towers apartments were situated on Lots 494,495 and 635 in the Mukim of Hulu Klang ("Highland Towers") and were built in front of a steep slope, which said slope was owned by Highland Properties Sdn Bhd who were also the developers for Highland Towers. Highland

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Properties transferred ownership of the bungalow lots on the hill slope to Arab Malaysian Finance Berhad ("AMFB"). On the hill slope was the East stream which originated from the Metrolux land which was land being developed by Metrolux Sdn Bhd and MBF Property Services Sdn Bhd. On 11 December 1993, a

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landslide occurred resulting in the collapse of Block 1 and the subsequent evacuation of the respondents from Blocks 2 and 3 of the Highland Towers. The respondents filed a suit in the High Court against various parties including the appellant herein for

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negligence and nuisance and the trial judge found the appellant to be 15% liable for negligence in respect of the appellant's acts and omissions prior to the collapse of Block 1 of the Highland Towers but held that s. 95(2) of the Street, Drainage and Building Act 1974 (Act 133) ("said Act") operated to indemnify the appellant

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of any pre-collapse liability but afforded no protection to the appellant for post-collapse liability. Both the appellant and respondents appealed to the Court of Appeal which allowed the appellant's appeal on post-collapse liability and the respondents' cross-appeal against the order of the High Court on the issue of

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indemnity under s. 95(2) of the said Act ("said decision"). The appellant and respondents have lodged their appeal and cross-appeal respectively against the said decision.

The issues that rose for determination *vide* this appeal were: (1) in a situation where a plaintiff sustains damage and alleges negligence against various defendants and the tribunal of fact ascribes negligence to the various defendants and there is a clear finding that the *causa causans* of the plaintiff's damage is the negligence of a particular defendant, can the other defendants who are guilty of certain negligent acts but whose negligent acts are held not to be the *causa causans* be held liable to the plaintiff as well; (2) whether s. 95(2) of the said Act is wide enough to provide immunity to a local authority in approving the diversion of a stream and in failing to detect any damage or defect in the building and drainage plans relating to the development submitted to the local authority by the architect and/or the engineer on behalf of the developer; (3) whether pure economic loss is recoverable under our Malaysian jurisprudence with reference to (a) negligence and (b) nuisance; (4) in a case involving different acts of negligence by multiple defendants committed at different times, whether those defendants are joint tortfeasors; and (5) whether the Court of Appeal erred in providing a distinction between private law and public law when finding that the appellant was not responsible to the 1st to the 73rd respondents for the appellant's acts and omissions as determined by the High Court following the collapse of Block 1 of the Highland Towers.

Held (allowing the appellant's appeal with costs and dismissing the respondents' cross-appeal, each party to bear their own costs)

Per Steve Shim CJ (Sabah & Sarawak):

(1) The use of the expression *causa causans* to describe AMFB's acts and omissions as being causative to the Highland Towers tragedy did not have the effect of excluding the culpability of the acts and omissions of the other defendants including the appellant. The relevant question is whether the acts and/or omissions of a particular defendant made a material contribution to the harm suffered by the plaintiff. When all the relevant authorities are examined in their proper perspective, the answer must be in the affirmative. (paras 3 & 4)

(2) It has been held that although a statute should be interpreted as far as possible to ensure it does not permit a tortfeasor to escape the wrongful consequences of his acts and omissions, nevertheless, a statutory body can be granted immunity from liability for such consequences if and only if the words

granting such immunity are clear and explicit. The Court of Appeal had accepted the factual finding of the learned trial judge that the appellant and/or its predecessor had created a danger when it required or approved the diversion of the East stream and that their subsequent failure or neglect in maintaining the said diversion or ensuring its proper maintenance constituted a breach of the duty of care on the part of the appellant and or its predecessor. The finding of the learned judge as to the creation of the danger in the diversion of the East stream relates essentially to approval and inspection by the appellant and or its predecessor, and when these facts are examined in the context of the specific provisions under s. 95(2) of the said Act, in particular the second and third limbs thereof, they fall squarely within its ambit and the appellant is fully protected from liability under the said section. (paras 7 & 8)

(3) In cases of pure economic loss in the law of negligence, the critical question is whether the scope of the duty of care in the circumstances of the case is such as to embrace damage of the kind which the plaintiff claims to have sustained and applies the *Caparo* test which takes into account the elements of foreseeability, proximity and the additional requirements of justice, fairness and reasonableness – *Murphy v. Brentwood*. Pure economic loss is recoverable for any form of nuisance recognized by the law – *Hunter v. Canary Wharf Ltd*. (paras 14 & 15)

(4) Where the injury has been done to the plaintiff and the injury is indivisible, any tortfeasor whose act has been a proximate cause of the injury, must compensate for the whole of it – *Dingle v. Associated Newspapers Ltd & Ors*. (para 18)

(5) Claims in negligence against local authorities can be brought by way of writ action if the claims depend on ordinary tort principles – *Roy v. Kensington & Chelsea and Westminster Family Practitioner Committee*. The appellant could not seek shelter under s. 95(2) of the said Act because this is a case of negligence in failing to formulate and implement certain works or plans and not negligence in carrying out those works or plans. This failure on the part of the appellant had resulted in the respondents incurring damages by having to evacuate their apartments on Block 2 & 3 of Highland Towers. The elements of foreseeability and proximity are clearly discernible from the

established facts and it would not be in the public interest that a local authority such as the appellant should be allowed to disclaim liability for negligence committed beyond the expansive shelter of s. 95(2) or other relevant provisions of the said Act nor would it be fair, just and reasonable to deprive the respondents of their rightful claims under the law. The respondents' claim for negligence by way of writ action is perfectly proper in law. (paras 22 & 23).

Per Abdul Hamid Mohamad FCJ:

(1) While economic loss under limited situations may be allowed, Malaysian courts will have to consider the effects of s. 3 of the Civil Law Act 1956 and considering the "public policy" and the "local circumstances", whether it is fair, just and reasonable to allow it on the facts and in the circumstances of the case. (para 74)

Bahasa Malaysia *translation of headnotes*

Blok 1, 2 dan 3 pangsapuri Highland Towers yang terletak atas Lot 494, 495 dan 635 dalam Mukim Hulu Klang ("Highland Towers") telah dibina dihadapan suatu tubir curam, yang mana tubir tersebut dimiliki oleh Highland Properties Sdn Bhd yang juga merupakan pemaju bagi Highland Towers. Highland Properties telah memindah milik haknya dalam lot bangalo di atas tubir tersebut kepada Arab Malaysian Finance Berhad ("AMFB"). Diatas tubir tersebut wujudnya anak sungai timur (East stream) yang berpunca daripada tanah Metrolux yang pada masa itu sedang dibangunkan oleh Metrolux Sdn Bhd dan MBF Property Services Sdn Bhd. Pada 11 Disember 1993, suatu tanah runtuh telah berlaku yang telah mengakibatkan Blok 1 Highland Towers runtuh dan/atau tumbang dan yang telah mengakibatkan responden dari Blok 2 & 3 Highland Towers tersebut terpaksa pindah. Responden telah memfailkan tindakan dalam Mahkamah Tinggi terhadap beberapa pihak termasuk perayu untuk kecuaian dan kacau-ganggu dan yang arif hakim telah memutuskan bahawa perayu adalah bertanggungjawab untuk kecuaiannya pada kadar 15% berdasarkan tindakannya dan/atau kegagalan mangambil tindakannya sebelum keruntuhan Blok 1 Highland Towers tetapi telah memutuskan bahawa s. 95(2) Akta Jalan, Penyaliran dan Bangunan 1974 (Akta 133) ("Akta Tersebut") berfungsi untuk menanggung rugi perayu terhadap sebarang liabiliti pra-runtuh tetapi tidak melindungi atau menanggung rugi perayu terhadap liabiliti post-runtuh. Kedua-dua pihak perayu dan responden telah

merayu kepada mahkamah rayuan yang telah membenarkan rayuan perayu atas isu liabiliti post-runtuh dan rayuan responden terhadap keputusan Mahkamah Tinggi atas isu tanggung rugi di bawah s. 95(2) Akta Tersebut ("keputusan tersebut"). Perayu dan responden kini telah memfailkan rayuan mereka masing-masing terhadap keputusan tersebut.

Isu-isu yang dibangkitkan melalui rayuan ini adalah: (1) dalam keadaan dimana plaintif mengalami kerugian dan mengatakan bahawa kecuaian wujud di pihak berbilang defendan dan tribunal fakta mendapati bahawa kecuaian tersebut sememangnya disebabkan oleh berbilang defendan dan terdapat keputusan yang jelas bahawa *causa causans* kerugian plaintif adalah disebabkan kecuaian di pihak satu defendan, adakah defendan lain yang walaupun juga bertanggungjawab untuk kecuaian tetapi bukan penyebab *causa causans*, bertanggungjawab kepada plaintif juga; (2) sama ada s. 95(2) Akta tersebut cukup lebar untuk memberikan perlindungan kepada majlis tempatan dalam tindakannya memberi persetujuan untuk mengubah alir anak sungai dan dalam kegagalan mereka untuk mengesan kerosakan atau defek dalam bangunan dan pelan penyaliran berhubung dengan pembangunan yang dikemukakan kepada majlis tempatan oleh arkitek dan/atau jurutera bagi pihak pemaju; (3) sama ada kehilangan ekonomi tulen (pure economic loss) boleh dituntut di bawah undang-undang Malaysia bagi (a) kecuaian dan (b) kacau-ganggu; (4) sama ada berbilang defendan yang melakukan kecuaian yang berbeza pada masa yang berbeza boleh dianggap sebagai pelaku tort bersama; dan (5) sama ada Mahkamah Rayuan telah melakukan kesilapan dalam membuat perbezaan antara undang-undang peribadi dan undang-undang awam bila membuat keputusan bahawa perayu tidak bertanggungjawab kepada responden 1 sehingga 73 bagi tindakannya dan/atau kegagalan mengambil tindakan di pihaknya sepertimana diputuskan oleh Mahkamah Tinggi berikutan keruntuhan Blok 1 Highland Towers.

Diputuskan (rayuan perayu dibenarkan dengan kos dan rayuan silang responden ditolak, kos ditanggung oleh kedua pihak)

Oleh Steve Shim HB (Sabah & Sarawak):

(1) Kegunaan phrasa *causa causans* untuk menggambarkan tindakan dan/atau kegagalan mengambil tindakan oleh AMFB yang adalah sebab mengapa terjadinya tragedi Highland Towers tidak mempunyai kesan untuk pengenepian kebersalahan

tindakan dan kegagalan mengambil tindakan defendan lain termasuk perayu. Persoalan yang relevan adalah sama ada tindakan dan atau kegagalan mengambil tindakan defendan lain telah menjadi penyebab material kepada kerugian yang dialami oleh plaintif. Apabila kesemua otoriti diperiksa dalam perspektif yang betul, jawapannya mestilah ya.

(2) Ianya telah diputuskan bahawa walaupun suatu kanun harus ditafsirkan sejauh mana yang mungkin untuk memastikan ianya tidak membenarkan seorang pelaku tort terlepas daripada akibat salah tindakan dan kegagalan mengambil tindakan di pihaknya, namun sebuah badan statutori boleh dilindungi daripada liabiliti yang timbul akibat tindakan dan atau kegagalan tindakannya sekiranya dan hanya dalam keadaan dimana perkataan yang memberikan perlindungan tersebut adalah jelas dan nyata. Mahkamah Rayuan telah menerima keputusan fakta hakim di Mahkamah Tinggi bahawa perayu dan/atau pendulunya telah mewujudkan bahaya apabila mereka memerlukan atau memberi persetujuan kepada penyimpangan anak sungai East dan dalam kegagalan mereka kemudiannya untuk menjaga dan memastikan penyelengaraan penyimpangan tersebut yang merupakan suatu kemungkiran kewajipan berhati-hati (breach of a duty of care) di pihak perayu dan pendulunya. Keputusan hakim Mahkamah Tinggi berkenaan wujudnya bahaya disebabkan penyimpangan anak sungai East berkait secara asas kepada persetujuan dan pemeriksaan oleh perayu dan pendulunya dan apabila fakta ini ditinjau dalam kontex peruntukan s. 95(2) Akta tersebut terutama sekali bahagian dua dan ketiga, ianya jatuh dalam lingkungannya dan perayu dilindungi daripada liabiliti di bawah seksyen tersebut.

(3) Dalam kes-kes kehilangan ekonomi tulen (pure economic loss) dalam undang-undang kecuaian, persoalan yang terpenting adalah sama ada skop kewajipan berhati-hati (duty of care) dalam sesuatu kes adalah jenis di mana ianya akan mengakibatkan kerugian sepertimana dikata dialami oleh plaintif dan mengguna pakai ujian *Caparo* yang mengambil kira elemen-elemen kebolehramalan, kedekatan, keadilan dan kemunasabahan – *Murphy v. Brentwood*. Kehilangan ekonomi tulen boleh dituntut dibawah sebarang bentuk kacau-ganggu yang diterima oleh undang-undang – *Hunter v. Canary Wharf Ltd.*

(4) Dimana kerosakan telah dialami oleh plaintif dan kerosakan tersebut tidak boleh dibahagikan, setiap pelaku tort yang tindakannya merupakan kausa kerosakan dekat, mesti memberi pampasan bagi keseluruhannya – *Dingle v. Associated Newspapers Ltd & Ors.*

(5) Tuntutan di dalam kes kecuaian terhadap majlis tempatan boleh dimulakan melalui writ sekiranya tuntutan tersebut adalah berdasarkan prinsip tort – *Roy v. Kensington & Chelsea and Westminster Family Practitioner Committee*. Perayu tidak boleh mendapat perlindungan di bawah s. 95(2) Akta tersebut kerana ini merupakan suatu kes kecuaian dimana mereka gagal untuk membentuk dan melaksanakan kerja atau pelan dan bukan dimana mereka cuai di dalam melaksanakan kerja atau pelan tersebut. Kegagalan perayu tersebut telah mengakibatkan kerugian di pihak responden dimana mereka terpaksa meninggalkan pangsapuri mereka di Blok 2 dan 3 Highland Towers. Elemen kebolehramalan dan kedekatan jelas terlihat daripada fakta dan ianya bukan di dalam kepentingan awam untuk membenarkan suatu majlis tempatan seperti perayu dilepaskan daripada liabilitinya bagi kecuaian yang dilakukan di luar perlindungan di bawah s. 95(2) atau mana-mana peruntukan lain di bawah Akta Tersebut malahan ianya tidak adil dan munasabah untuk menghalang responden akan tuntutan mereka yang sahih di bawah undang-undang. Tuntutan responden bagi kecuaian melalui tindakan writ adalah sahih dari segi undang-undang.

Oleh Abdul Hamid Mohamad HMP:

(1) Walaupun kehilangan ekonomi tulen dibawah keadaan-keadaan tertentu boleh dibenarkan, mahkamah di Malaysia mesti mengambil kira kesan s. 3 Akta Undang-undang Sivil 1956 dan dalam mengambil kira "kepentingan awam" dan "keadaan-keadaan tempatan", sama ada ianya adil dan munasabah untuk membenarkannya atas fakta dan dalam mengambil kira semua situasi kes.

Case(s) referred to:

Allen v. Gulf Oil Refining Ltd [1981] AC 1004 ***(refd)***
Anns v. Merton London Borough Council [1978] AC 728 ***(refd)***
Bonnington Castings v. Wardlaw [1956] AC 613 ***(refd)***
Boulting v. Association of Cinematograph, Television & Allied Technicians [1963] 2 QB 606 ***(refd)***

Caparo Industries plc v. Dickman & Ors [1990] 1 All ER 568 ***(refd)***
Caparo Industries Plc v. Dickman [1990] 2 AC 605 ***(refd)***
Capital & Countries Plc v. Hampshire County Council [1997] GB 1004 ***(refd)***
Chappel v. Hart [1998] 156 ALR 517 ***(refd)***
Chung Khiaw Bank Ltd v. Hotel Rasa Sayang [1990] 1 CLJ 675; [1990] 1 CLJ (Rep) 57 SC ***(refd)***
David Geddis v. Proprietors of Bana Reservoir [1878] 3 AC 430 ***(refd)***
Davy v. Spelthorne Borough Council (184) A (262) ***(refd)***
Dingle v. Associated Newspapers Ltd & Ors [1961] 2 QB 162 ***(refd)***
Donoghue v. Stevenson [1932] AC 562 ***(refd)***
Dr Abdul Hamid Abdul Rashid & Anor v. Jurusan Malaysia Consultants & Ors [1999] 8 CLJ 131 HC ***(refd)***
Environment Agency (Formerly National Rivers Authority) v. Empress Car Co (Abertillery) Ltd [1999] 2 AC 23 ***(refd)***
Fairchild (suing on her own behalf) etc v. Glenhaven Funeral Services Ltd & Ors, etc. [2002] 3 WLR 89 ***(refd)***
Harris v. Evans [1998] 1 WLR 1285 ***(refd)***
Hedley Byrne & Co v. Heller & Partners Ltd [1964] AC 465 ***(refd)***
Hedley Byrue & Co Ltd & Partners Ltd [1964] 2 All ER 575 ***(refd)***
Invercargill City Council v. Hamlin [1996] 1 All ER 756 ***(refd)***
Jamal Harun v. Yang Kamsiah & Anor [1984] 1 CLJ 215; [1984] 1 CLJ (Rep) 11 PC ***(refd)***
Kane v. New Forest District Council [2001] 3 All ER 914 ***(refd)***
Kerajaan Malaysia v. Chuah Fong Shiew [1993] 2 MLJ 439 ***(refd)***
Liew Choy Hung v. Shah Alam Properties Sdn Bhd [1997] 2 CLJ 601 FC ***(refd)***
Malaysian National Insurance Sdn Bhd v. Lim Tiok [1997] 2 CLJ 351 SC ***(refd)***
Man B & W Diesel SE Asia Pte Ltd & Anor v. PT Bumi International Tankers & Another Appeal [2004] 2 SLR 300 ***(refd)***
March v. E & MH Stramare Pty Ltd & Anor [1991] 99 ALR 423 ***(refd)***
Marc Rich & Co. AG v. Bishop Marine Co. Ltd [1996] 1 AC 211 ***(refd)***
Murphy v. Brentwood District Council [1990] 2 All ER 908 ***(refd)***
Murphy v. Brentwood District Council [1991] 1 AC 398 ***(refd)***
Nepline Sdn Bhd v. Jones Lang Wootton [1995] 1 CLJ 865 HC ***(refd)***
Nicholsons & Ors v. Atlas Steel Foundary & Engineering Co Ltd [1957] 1 WLR 631 ***(refd)***
Oli Mohamed v. Keith Murphy & Anor [1969] 2 MLJ 244 ***(refd)***
Perre & Ors v. Apand Pty Ltd [1999] 164 ALR 606 ***(refd)***
Phelps v. Hillingdon London Borough Council [2001] 2 AC 6019 ***(refd)***
Pilba Trading & Agency v. South East Asia Insurance Bhd & Anor [1999] 8 CLJ 403 HC ***(refd)***
RSP Architects Planners & Engineers (Reglan Squire & Partners FE) v. Management Corporation Strata Title No. 1075 [1999] 2 SLR 449 ***(refd)***
RSP Architects Planniners & Engineers v. Ocean Front Pte Ltd & Anor Appeal [1996] 1 SLR 113 ***(refd)***

Roy v. Kensington & Chelsea and Westminster Family Practitioner Committee [1992] 1 All ER 705 ***(refd)***
Smith, Hogg & Company Ltd v. Black Sea & Baltic General Insurance Co Ltd [1940] AC 997 ***(refd)***
South Pacific Manufacturing Co Ltd v. New Zealand Security Consultants & Investigations Ltd [1992] 2 NZLR 282 ***(refd)***
Spring v. Guardian Assurance Plc [1985] 2 AC 295 ***(refd)***
Sutherland Shire Council v. Heyman & Anor [1985] 157 CLR 424 ***(refd)***
Syarikat Batu Sinar Sdn Bhd & Ors v. UMBC Finance Bhd & Ors [1990] 2 CLJ 691; [1990] 3 CLJ 140 HC ***(refd)***
Teh Khem On & Anor v. Yeoh & Wu Development Sdn Bhd & Ors [1996] 2 CLJ 1105 HC ***(refd)***
White v. Jones [1995] 2 AC 207 ***(refd)***
Winnipeg Condominium Corp No. 36 v. Bird Construction Co Ltd & Ors [1995] 121 DLR (4th edn) 193 ***(refd)***

Legislation referred to:
Civil Law Act 1956, s. 3(1)
Rules of the High Court 1980, O. 18 r. 19, O. 53
Street, Drainage & Buiding Act 1974, ss. 54, 55, 95(2)

Other source(s) referred to:
LC Green, *Filling Lacunae in the Law* [1963] MLJ xxviii

For the appellant - VS Viswanathan; M/s VS Viswa & Co
For the respondents no 1-73 - Rajendra Navaratnam (Yatiswara Ramachandran, Marion Qua Li Lian & Toh Chia Hua with him); M/s Azman Davidson & Co
For the respondent no 74 - Shamsudin Abdullah
For the respondent no 77 - D Bhaskaran (David Soosay with him); M/s Shearn Delamore & Co

Reported by Sharmini Pillai

JUDGMENT

Steve Shim CJ (Sabah & Sarawak):

The Issues

[1] There are two appeals before us – one, an appeal proper by the appellant, Majlis Perbandaran Ampang Jaya (MPAJ) and the other, a cross-appeal by the respondents. More specifically, the appellant's appeal is directed at the decision of the Court of Appeal in affirming the High Court's finding that the appellant was 15% liable to the respondents for negligence and nuisance. And the respondents' cross-appeal is aimed at the Court of Appeal's decision that their cause of action against the appellant for alleged

post-collapse liability lay in the area of public law and not private law. In effect and in substance, the appeal and cross-appeal can be said to relate to issues encapsulated in the questions upon which leave to appeal was granted by this court. These questions are postulated as follows:

1. Where a plaintiff sustains damage and alleges negligence against various defendants and the tribunal of fact ascribes negligence to the various defendants and where there is a clear finding that the *causa causans* of the plaintiff's damage is the negligence of a particular defendant, whether in that circumstance, the other defendants who are guilty of certain negligent acts but whose negligent acts are not held to be the *causa causans* can be held liable to the plaintiff as well.

2. Whether s. 95(2) of the Street, Drainage & Building Act 1974 (Act 133) is wide enough to provide immunity to a local authority in approving the diversion of a stream and in failing to detect any damage or defect in the building and drainage plans relating to the development submitted to the local authority by the architect and/or the engineer on behalf of the developer.

3. Whether pure economic loss is recoverable under our Malaysian jurisprudence with reference to (a) negligence and (b) nuisance.

4. In a case involving different acts of negligence by multiple defendants committed at different times, whether those defendants are joint tortfeasors.

5. Whether the Court of Appeal erred in providing a distinction between private law and public law when finding that the appellant was not responsible to the 1st to 73rd respondents for the appellant's acts and omissions as determined by the High Court following the collapse of Block 1 of Highland Towers.

The Background Facts

[2] The factual matrix relevant to the issues can be briefly stated. The Highland Towers consisted of three blocks of apartment known as Blocks 1, 2 and 3 situated on Lots 494, 495 and 635 Mukim, Hulu Klang. These apartment blocks were built in front of a steep slope. The hill slope was originally owned by Highland Properties Sdn. Bhd., the developer who also developed

Highland Towers. Highland Properties initially intended to construct three apartment blocks on the Highland Towers site and bungalows on the hill slope. Ultimately, only the three apartment blocks were built. This was between 1975 and 1978. No bungalows were constructed on the hill slope. In 1991, Highland Properties transferred ownership of the bungalow lots on the hill slope to Arab Malaysian Finance Bhd (AMFB) as part of a set-off for unpaid loans. On the hill slope was a stream which was referred to at the trial as the "East stream". The East stream originated from land that was being developed by Metrolux Sdn. Bhd. and MBF Property Services Sdn. Bhd. This land was referred to as the "Metrolux land". On 11 December 1993, a landslide occurred resulting in the collapse of Block 1 and the subsequent evacuation of the respondents from Blocks 2 and 3. The respondents then filed a suit in the High Court against various parties including MPAJ, the appellant herein, for negligence and nuisance. After a lengthy hearing, the learned trial judge found the appellant who was the 4th defendant in the case to be 15% liable for negligence in respect of the appellant's acts and omissions prior to the collapse of Block 1 of the Highland Towers. However, he held that s. 95(2) of the Street, Drainage & Building Act 1974 (Act 133) operated to indemnify the appellant of any pre-collapse liability but provided no protection to the appellant for post-collapse liability. Dissatisfied, both the appellant and respondents appealed to the Court of Appeal. The Court of Appeal allowed the appellant's appeal on post-collapse liability. They also allowed the cross-appeal by the respondents against the order of the High Court on the indemnity issue under s. 95(2). Against that decision, the appellant and the respondents have lodged their appeal and cross-appeal respectively. As I have said, leave to appeal and cross-appeal were granted.

Causa Causans

[3] The issue relating to the first question is simple enough. Here, counsel for the appellant MPAJ has submitted that as the learned trial judge had found the acts and omissions of Arab Malaysian Finance Bhd (AMFB) were the *causa causans* of the collapse of Block 1 of Highland Towers, this would have the effect of precluding the learned trial judge in finding that the acts and omission of the other defendants had in fact caused harm to the respondents. In response to this, counsel for the respondents contends that such a submission amounted to misreading the learned trial judge's judgment. In my view, the use of the

expression "*causa causans*" to describe AMFB's acts and omissions as being causative of the Highland Towers tragedy did not have the effect of excluding the culpability of the acts and omissions of the other defendants including MPAJ. The relevant passage in his judgment reads:

> Mr. Abraham in his submission argues that the plaintiffs must prove that the acts and/or omissions of the 5th defendant was or were the effective cause or the *causa causans* of the collapse of Block 1 leading to the forced evacuation of the plaintiffs from Blocks 2 and 3. To decide on this, reference must be made to my finding on the cause of the collapse of Block 1. Since it is already decided that it was due to a landslide caused primarily by water which emanated from the damage pipe culvert and the inadequate and unattended drains on the 5th defendant's land, then the plaintiffs have sufficiently proved the *causa causans* of the collapse of Block 1 leading to the forced evacuation of the plaintiffs from Blocks 2 and 3, was due to the acts and/or omissions of the defendants in not maintaining those watercourses.

The 5th defendant above refers to AMFB. The expression "*causa causans*" merely means a cause that causes: (*Smith, Hogg & Company Ltd. v. Black Sea & Baltic General Insurance Co. Ltd* [1940] AC 997, 1003). There may be more than one cause that causes a particular injury. From the passage cited above, it would appear that Mr. Abraham was of the view that *causa causans* merely meant an effective cause. It has been held that such an expression should be avoided as the issue of causation does not necessarily turn upon it: (see *Environment Agency (Formerly National Rivers Authority) v. Empress Car Co. (Abertillery) Ltd* [1999] 2 AC 23, 29). Causation is a matter to be determined by common sense and what the law regards as fair, just and reasonable in the circumstances of a particular case (see *Fairchild (suing on her own behalf) etc v. Glenhaven Funeral Services Ltd & Ors, etc.* [2002] 3 WLR 89; *March v E & MH Stramare Pty Ltd & Anor* [1991] 99 ALR 423, 429). The relevant question is whether the acts and/or omissions of a particular defendant made a material contribution to the harm suffered by the plaintiff (see *Bonnington Castings v. Wardlaw* [1956] AC 613, 620, 623; *Nicholsons & Ors v. Atlas Steel Foundary & Engineering Co. Ltd* [1957] 1 WLR 631, 624; *Fairchild (suing on her own behalf) etc v. Glenhaven Funeral Services (supra)*; *Chappel v. Hart* [1998] 156 ALR 517, 524-524).

[4] When all the relevant authorities are examined in their proper perspective, the answer to the first question must be in the affirmative.

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Scope Of s. 95(2) Of Act 133

[5] The second question postulated concerns the scope of s. 95(2) of the Street, Drainage & Building Act 1974 (Act 133) when examined in the context of the factual circumstances of this
B case. Here, the learned trial judge found that the landslide was caused by soil on the hill slope being saturated with excessive water; that this water triggered the failure of the high retaining wall within the Highland Towers compound which in turn caused what was described as a retrogressive landslide on the hill slope
C resulting in the collapse of Block 1. The learned trial judge concluded that water played a significant part in the landslide which eventually caused the collapse of Block 1. He held that the presence of water was due to the existence of an inadequate drainage system. This is clear from the following passage of his
D judgment which states:

> As a local authority, the 4th defendant owes a duty or care to the plaintiffs to use reasonable care, skill and diligence to ensure that the hillslope and the drainage thereon were properly accommodated before approving building or other related plans and
E during construction stage, to comply with and to ensure the implementation of the drainage system. Then when CFs were applied for, there should be proper and thorough inspection on whether the buildings so built, were safe in all aspect and not just confined to the structure. And after the Highland Towers was
F erected, to ensure slope stability – behind Block 1. Then subsequent to the collapse of Block 1, measures should have been taken to prevent recurrence of the tragedy to Blocks 2 and 3.

The 4th defendant alluded above refers to MPAJ. There is ample evidence to show that MPAJ and/or its predecessor Majlis Daerah
G Gombak had required a proper drainage system to be implemented on the hillslope before and during the construction of the Highland Towers apartment blocks. Indeed, the Jabatan Pengairan and Saluran (JPS) had consistently advised MPAJ and/or its predecessor of this necessity in order to forestall any possibility of
H damage to the apartment blocks to be built and thereby avoiding consequential loss to the owners and occupiers thereof.

[6] On the need by MPAJ and/or its predecessor to maintain the East stream, the learned trial judge said this:

I

> But under ss. 53 & 54 of the Street, Drainage & Building Act, 1974, the 4th defendant, being the local authority of the area, has a duty to maintain 'watercourses' within its jurisdiction. And 'watercourses' under ss. 53 & 54 of the Street, Drainage & Building Act, 1974 as defined in the case of *Azizah Zainal Abidin & Ors v. Dato' Bandar Kuala Lumpur (supra)*, include streams and rivers. Thus, possessed of this duty, Mr. Navaratnam alleges that the 4th defendant has breached its duty of care when it failed and/or neglected and is still failing and/or neglecting to maintain this stream, which was the major factor that caused the collapse of Block 1 and is an important element in ensuring the instability of the slope behind Blocks 2 and 3 at the present moment.
>
> I am much convinced by this argument above and based on the facts as disclosed, I find such a duty of care exists and this duty has been breached by the defendant resulting in damages to the plaintiffs.

From the facts as found by the learned trial judge, it seems evident that the need by MPAJ and/or its predecessor Majlis Daerah Gombak to divert the East stream must have been intended to resolve the drainage problems in the affected areas around the hill slope behind the Highland Towers. There is no dispute by the respondents that if the drainage was implemented in accordance with the P34 plan, the possibility of a land slide causing the collapse of Block 1 would not have occurred. Having required the diversion of the East stream, as in the P34 plan, it would have been reasonable to expect the local authority (in this case MPAJ and/or its predecessor) to ensure its proper maintenance. This would have entailed a duty on the part of the said local authority to conduct regular inspections so as to ensure its proper implementation of the said diversion. The learned trial judge found this to be wanting. Not surprisingly, he found support in the respondents' contention that MPAJ and/or its predecessor had breached its duty of care in failing and/or neglecting to maintain the East stream, which according to him, "was a major factor that caused the collapse of Block 1 and an important element in ensuring the instability of the slope behind Blocks 2 and 3".

[7] Now, although the learned trial judge held that MPAJ and/or its predecessor to be negligent, he took the view that they were protected from liability by virtue of s. 95(2) of Act 133. He felt that the immunity provided under the said section was wide

enough to embrace the alleged danger created by MPAJ and/or its predecessor in diverting the East stream. On appeal, the Court of Appeal took a different approach. It said as follows:

> Mr. Navaratnan learned counsel for the plaintiffs has submitted that the section does not apply to the facts of the present instance. For, this is a case which the 4th defendant directed the carrying out of certain works thereby creating a danger to the plaintiffs' property. Counsel is referring to the requirement by the 4th defendant that the East stream be diverted from its natural course. This is a fact as found by the trial court and amply borne out by the evidence, the relevant parts of which were read to us. Accordingly, this is not merely a case of – to borrow the language of the section – inspection or approval of building or other works or the plans thereof. This is a case where a danger was expressly created at the instance of the 4th defendant. We are therefore in agreement with learned counsel for the plaintiffs that the judge went wrong on the indemnity point.

The Court of Appeal went on to extrapolate on the common law duty of care a local authority such as the 4th defendant owed to a third party citing a number of cases including *Kane v. New Forest District Council* [2001] 3 All ER 914. The court then states:

> If the local authority in *Kane v. New Forest District Council (supra)* could not wash its hands off the danger in the footpath it required to be constructed, we are unable to see how the 4th defendant could possibly escape liability in the present case of requiring the diversion of the East stream. Accordingly, we set aside the indemnity granted to the 4th defendant by the trial judge. The consequence is that the 4th defendant is liable to the plaintiffs in the tort of negligence. We would add for good measure that the kind of harm that was foreseeable by the 5th defendant was equally foreseeable by the 4th defendant. Upon the evidence on record and applying it to the relevant principles already referred to earlier in this judgment, it is clear that the 4th defendant must as a reasonable local authority have foreseen the danger created by diverting the East stream would probably cause a landslide of the kind that happened and that in such event, resultant harm, including financial loss of the kind suffered by the plaintiffs, would occur. We would in the circumstances uphold the apportionment of liability as against the 4th defendant.

Essentially, the position taken by the Court of Appeal is that the appellant (who is a local authority) had created a danger by requiring or approving the diversion of the East stream on the hill slope behind Highland Towers. Now, s. 95(2) reads:

> The State Authority, local authority and any public officer or employee of the local authority shall not be subject to any action, claim, liability or demand whatsoever arising out of any building or other works carried out in accordance with the provision of this Act or any by-laws made thereunder or by reason of the fact that such building works or plans thereof are subject to inspection and approval by the State Authority, local authority or such public officer or employee of the State Authority or the local authority and nothing in this Act or any by-laws made thereunder shall make it obligatory for the State Authority or the local authority to inspect any building, building works or materials or the site of any proposed building to ascertain that the provisions of this Act or any by-laws made thereunder are complied with or that plans, certificates and notices submitted to him are accurate.

In this connection, counsel for the respondents has submitted that s. 95(2) does not give local authorities any power to act negligently or create a nuisance. He contends that as an essential principle of statutory interpretation, statutory powers granted to local authorities must be exercised without negligence and without committing avoidable nuisances, citing in support cases such as *David Geddis v. Proprietors of Bana Reservoir* [1878] 3 AC 430, 447; *Allen v. Gulf Oil Refining Ltd* [1981] AC 1004, 1011; *Capital & Countries Plc. v. Hampshire County Council* [1997] GB 1004, 1045. As a general principle, I agree that is the correct approach. However, it has been held that although a statute should be interpreted as far as possible to ensure it does not permit a tortfeasor to escape the wrongful consequences of his acts and omissions, nevertheless a statutory body can be granted immunity from liability for such consequences if and only if the words granting such immunity are clear and explicit: (see *Boulting v. Association of Cinematograph, Television & Allied Technicians* [1963] 2 QB 606, 643-644; *Capital & Countries Plc. v. Hampshire County Council (supra)*. The issue before us is whether s. 95(2) grants such an immunity, Here, the respondents have taken the position that when the factual matrix of this case is examined in the context of s. 95(2), they do not afford MPAJ and/or its predecessor any protection whatsoever. Counsel for the respondents contends that there are 3 limbs to s. 95(2). According to him, the first limb only protects local authorities from liability for building or other works carried out in accordance with Act 133; the second limb merely states that local authorities shall not be under any liability simply because building works and building plans are subject to inspection and approval; and the third

limb states that local authorities shall not be under any obligation to inspect buildings and building works to ascertain that they comply with Act 133.

[8] Counsel for the respondents seems to have placed much emphasis on the first limb in s. 95(2), contending that MPAJ and/or its predecessor, by creating a danger, had failed to carry out its duty in accordance with Act 133, drawing particular attention to ss. 54 & 55 thereof and therefore not subject to any protection under the said s. 95(2). With respect this argument is quite misconceived. As I indicated earlier, the Court of Appeal had accepted the factual finding of the learned trial judge that MPAJ and/or its predecessor had created a danger when it required or approved the diversion of the East stream and subsequently failing or neglecting to maintain the said diversion or to ensure its proper maintenance. As the learned trial judge has pointed out, proper maintenance would have involved regular and effective inspections to be conducted by MPAJ and/or its predecessor. He held that such failure or neglect constituted a breach of the duty of care on the part of MPAJ and/or its predecessor. In effect, the finding of the learned trial judge as to the creation of the danger in the diversion of the East stream relates essentially to approval and inspection by MPAJ and/or its predecessor. Thus, when the facts as found by the learned trial judge which were accepted by the Court of Appeal are examined in the context of the specific provision under s. 95(2), in particular the second and third limbs thereof, they fall squarely within its ambit. In my view, MPAJ and/or its predecessor Majlis Daerah Gombak are fully protected from liability under the said section. For the reasons stated, the Court of Appeal has therefore erred in holding otherwise. It is in this context that the second question postulated has to be answered.

Pure Economic Loss

The third question postulated the consideration of whether pure economic loss is recoverable under the Malaysian jurisprudence in negligence and nuisance. In the law of negligence, there is no immutable rule that pure economic loss is not recoverable. All major Commonwealth jurisdictions recognize that pure economic loss is recoverable in negligence. Under English law, the general duty of care test enunciated in *Caparo Industries Plc. v. Dickman* [1990] 2 AC 605 is applicable to all negligence claims, including

claims for pure economic loss. Pursuant to this test, 3 questions have to be addressed, namely, whether the damage suffered by the plaintiff is reasonably foreseeable; whether there is a relationship of proximity between the plaintiff and defendant; and whether it is fair and reasonable that the defendant should owe the plaintiff a duty of care. The English courts have adopted a dual approach in applying the *Caparo* test (see *Marc Rich & Co. AG v. Bishop Marine Co. Ltd* [1996] 1 AC 211). The first concerns the "categorization approach". Here, the English courts would determine if the plaintiff's claim falls into a recognized category of liability. In cases of pure economic loss, the recognized categories include the following scenarios ie, (1) where a defendant has assumed a particular responsibility towards the plaintiff. For example, in *White v. Jones* [1995] 2 AC 207, where a solicitor was found to have assumed a responsibility towards the beneficiary under a will when drafting the will pursuant to a testator's instructions; (2) where a defendant has exposed a plaintiff to a particular danger (see *Harris v. Evans* [1998] 1 WLR 1285) and (3) where there is a recognized legal relationship between the plaintiff and defendant. For example, in *Phelps v. Hillingdon London Borough Council* [2001] 2 AC 6019, 667, it was found that a teacher-pupil relationship might place a teacher under a duty of care not to cause pure economic loss by teaching pupils the wrong syllabus. The second concerns the "open-ended approach". Here, if the facts of a particular case do not come within a recognized category of liability, a court could go further to look at the facts closely to determine if a duty of care should nevertheless be owed by the defendant to the plaintiff. Recent statements by the English courts confirm that the "open-ended approach" can be used to recognize duties of care in new situations: (see *Spring v. Guardian Assurance Plc.* [1985] 2 AC 295.)

[10] In the instant case, the Court of Appeal held that under the Atkinian doctrine, loss of any type or description is recoverable provided that it is reasonably foreseeable; that it is not the nature of the damage itself, whether physical or pure financial loss, that is determinative of remoteness and the critical question is whether the scope of the duty of care in the circumstances of the case is such as to embrace damage of the kind that the plaintiff claims to have sustained, whether it be pure economic loss or injury to person or property. The Court of Appeal relied on the English case of *Murphy v. Brentwood District Council* [1991] 1 AC 398.

[11] Now, *Murphy v. Brentwood (supra)* merely involved an application of the *Caparo* test to the facts of that case. There, the defendant council had powers to inspect buildings and other foundations to ensure that they complied with the building by-laws. The plaintiff's home suffered from defective foundations. He sued the defendant council alleging that it failed to detect the defects during the course of construction. On the previous authority of *Anns v. Merton London Borough Council* [1978] AC 728, the plaintiff ought to have succeeded. He however failed in the House of Lords. The majority of their Lordships (ie, Lords Mackay, Keith, Bridge and Jauncey) adopted the following reasons in denying relief to the plaintiff:

(1) That *Donoghue v. Stevenson* [1932] AC 562 only dealt with the situation whether a defective chattel or building caused personal injury or harm to property that was distinct and separate from the defective chattel itself. If a plaintiff sought recovery for the cost of repairing or replacing a defective chattel or building before it caused personal injury or damage to other property, such a claim would be one for pure economic loss;

(2) That recovery for pure economic loss in the law of negligence was restricted to circumstances where there was reliance on another person's advice or conduct as was the case in *Hedley Byrne & Co. v. Heller & Partners Ltd.* [1964] AC 465;

(3) That a builder was not liable for the pure economic loss of correcting defects in a building before they caused harm to other property or personal injury unless reliance in the sense envisaged in *Hedley Byrne* was shown to exist. Similarly, the defendant council could not be made liable for the cost of correcting such defects;

(4) That it was not fair, just and reasonable to recognize liability on the part of the defendant council for failing to detect errors in buildings in the course of exercising its statutory powers of inspection under the Defective Premises Act 1972 (UK).

It is perhaps important to note, from the analysis of the various speeches of the law Lords in *Murphy v. Brentwood (supra)* that pure economic loss is recoverable in negligence in English law on the two alternate bases, namely the "categorization approach" and the "open-ended approach" alluded to earlier. I may add that the

two approaches do not exist in strict water tight compartments. It is possible for them to overlap: (see *Kane v. New Forest District Council (supra)*.

[12] In Australia, it is accepted that pure economic loss in the law of negligence is not restricted to particular categories or approaches. The High Court of Australia in *Perre & Ors v. Apand Pty Ltd* [1999] 164 ALR 606 seems to have adopted the "open-ended approach" in assessing claims for pure economic loss in the law of negligence. Although the various members of the High Court have expressed differing views, they all agree that claims for pure economic loss in the law of negligence are not precluded and will depend on the facts of individual cases. The New Zealand courts have also adopted the "open-ended approach" to claims for pure economic loss: (see *South Pacific Manufacturing Co. Ltd v. New Zealand Security Consultants & Investigations Ltd* [1992] 2 NZLR 282.) In Singapore too, the courts have recognized the "open-ended approach". In *RSP Architects Planners & Engineers (Reglan Squire & Partners F.E.) v. Management Corporation Strata Title No. 1075* [1999] 2 SLR 449, the Court of Appeal has held that whether a defendant owes the plaintiff a duty of care not to cause the particular type of loss depends on the circumstances and facts of that case. This view has been confirmed in the recent case of *Man B & W Diesel S E Asia Pte Ltd & Anor v. P.T. Bumi International Tankers & Another Appeal* [2004] 2 SLR 300, 318 where the Court of Appeal also expresses the view that the principle in *Donoughue v. Stevenson* [1932] AC 562 was still evolving and could offer redress for loss suffered by the plaintiff as a result of defendant's acts and omissions in circumstances where a remedy for such losses would not otherwise exist.

[13] Having had the benefit of reading the various authorities on this subject, I am more inclined to accept the positions taken by the courts in Australia and Singapore. In adopting the sentiments and observations expressed by the Singapore Court of Appeal in *PT Bumi International Tankers (supra)* I would also endorse the view that caution should be exercised in extending the principle in *Donoghue v. Stevensen* to new situations. Much would depend on the facts and circumstances of each case in determining the existence or otherwise of a duty of care.

[14] The Court of Appeal in the instant case is correct in adopting the view expressed by Lord Oliver in *Murphy v. Brentwood (supra)* that the critical question is not the nature of the

damage itself, whether physical or pecuniary, but whether the scope of the duty of care in the circumstances of the case is such as to embrace damage of the kind which the plaintiff claims to have sustained. The decision in *Murphy* involves, as I have mentioned earlier, the application of the *Caparo* test which takes into account the elements of foreseeability, proximity and the additional requirement of justice, fairness and reasonableness.

[15] Now, the exposition above relates to pure economic loss in the law of negligence. What is the position in the law of nuisance? Here, I need only rely on the speech of Lord Lloyd in *Hunter v. Canary Wharf Ltd* [1997] 2 WLR 684, a case also cited with approval by the Court of Appeal in the instant case. Therein, Lord Lloyd has said this:

> It has been said that an actionable nuisance is incapable of exact definition. But the essence of nuisance is easy enough to identify, and it is the same in all three cases of private nuisance, namely, interference with land or the enjoyment of land. In the case of nuisances within class (1) or (2), the measure of damages is, as I have said, the diminution of the value of the land. Exactly the same should be true of nuisances within class (3). There is no difference in principle. The effect of smoke from a neighbouring factory is to reduce the value of the land. There may be no diminution in the market value. But there will certainly be loss of amenity value so long as the nuisance lasts. If that is the right approach, then the reduction in amenity value is the same whether the land is recognized by the family man or the bachelor.

The three classes of private nuisance referred to by Lord Lloyd are (1) nuisance by encroachment on a neighbour's land; (2) nuisance by direct physical injury to a neighbour's land; and (3) nuisance by interference with a neighbour's quiet enjoyment of his land. On the authority in *Hunter v. Canary Wharf Ltd (supra)*, which I accept to be correct, it seems clear that pure economic loss is recoverable for any of the forms of nuisance recognized by law. Indeed, the fact that damages for diminution in value in land are recoverable in nuisance has been recognized by the Federal Court in *Liew Choy Hung v. Shah Alam Properties Sdn Bhd.* [1997] 2 CLJ 601.

[16] Before us, both the appellant and respondents are on common ground that recovery for pure economic loss is permitted in the law of negligence. However, they disagree on their application to the facts of the instant case. For the respondents, it is submitted that they should be allowed to recover economic

loss against MPAJ and/or its predecessor Majlis Daerah Gombak. They advanced the following grounds: First, the danger posed by the concept of diverting the East stream across the hill slope behind Highland Towers was reasonably foreseeable. It was recognized by existing engineering codes. Secondly, the drainage requirements for the hill slope imposed by JPS were the result of its concerns for the safety of the Highland Towers apartment blocks, which were in close proximity to the hill slope. There was therefore a direct link between the need for a safe drainage scheme on the hill slope and the Highland Towers apartment blocks below it. Thirdly, the Highland Towers tragedy rocked the nation and the world. Forty-eight people died and many were made homeless. It has been urged upon this court that public policy would only accord with common sense and public perception if MPAJ and/or its predecessor were held liable for requiring or approving the diversion of the East stream without ensuring its proper maintenance. On the grounds so advanced, negligence would have been attributed to MPAJ and/or its predecessor. But, for the reasons already stated, they are however immunized against any liability under s. 95(2) of Act 133.

Joint Tortfeasors

[17] The issue here is whether defendants are joint tortfeasors in a case involving different acts of negligence by multiple defendants committed at different times. In my view, the answer to this question can be found in the Supreme Court case of *Malaysian National Insurance Sdn Bhd v. Lim Tiok* [1997] 2 CLJ 351, 375 wherein Edgar Joseph Jr. FCJ said:

> To recapitulate, at common law, if each of several persons, not acting in concert, commits a tort against another person substantially contemporaneously and causing the same or indivisible damage, each tortfeasor is liable for these same damages.

[18] Counsel for the respondents has cast doubt on the correctness of this proposition which adopts the stand taken by Choor Singh, J in *Oli Mohamed v. Keith Murphy & Anor* [1969] 2 MLJ 244, 245, who in turn cited in support the following passage of a speech by Delvin, LJ in *Dingle v. Associated Newspapers Ltd. & Ors* [1961] 2 QB 162:

A … Where injury has been done to the plaintiff and the injury is indivisible, any tortfeasor whose act has been a proximate cause of the injury, must compensate for the whole of it. As between the plaintiff and the defendant, it is immaterial that there were others whose acts also have been a cause of the injury and it
B does not matter whether those others have or have not a good defence. These factors would be relevant in a claim between tortfeasors for contribution, but the plaintiff is not concerned with that; he can obtain judgment for total compensation from anyone whose act has been a cause of his injury. If there are more than one of such persons, it is immaterial to the plaintiff whether they
C are joint tortfeasors or not. If four men, acting severally and not in concert, strike the plaintiff one after another and as a result of his injuries he suffers shock and is detained in hospital and loses a month's wages, each wrong-doer is liable to compensate for the whole loss of earnings. If there were four distinct physical injuries,
D each man would be liable only for the consequences peculiar to the injury he inflicted, but in the example I have given, the loss of earnings is one injury caused in part by all the four defendants. It is essential for this purpose that the loss should be one and indivisible; whether it is so or not is a matter of fact and not a matter of law …

E

According to counsel, Choor Singh J, in citing the above passage, has erred in suggesting that the acts of different defendants must be sufficiently contemporaneous before there can be concurrent liability in tort. He submits that the passage cited above shows
F clearly that the imposition of joint and several liability on defendants as concurrent tortfeasors is not premised on the contemporaniety of their actions but is determined by deciding whether their separate actions caused the plaintiff indivisible harm. With respect, counsel is misconceived. In my view, the first
G sentence in that passage is sufficiently clear. I would repeat it for emphasis – "where the injury has been done to the plaintiff and the injury is indivisible, any tortfeasor whose act has been a proximate cause of the injury, must compensate for the whole of it." When the words underscored above are examined in their
H proper perspective, particularly in the light of the illustration given in the same passage, there can be little doubt that the statement of Edgar Joseph Jr. FCJ represents the correct reflection of the position taken by Lord Delvin in Dingle. In the circumstances, the attempt by counsel for the respondents to revisit *Malaysian*
I *National Insurance (supra)*, in terms of his proposition, has no basis whatsoever.

Private Law And Public Law

[19] The fifth question seeks a consideration of whether the Court of Appeal has erred in holding that the respondents' cause of action lay in the area of public law and not private law. The complaint of the respondents seems to be directed at the following passage of its judgment:

> Now, assuming that there was a duty on the 4th defendant to act in a particular manner towards the property of the plaintiff's post collapse, such duty must find its expression in public law and not private law. Accordingly, if there had been a failure on the part of the 4th defendant to do or not to do something as a public authority, the proper method is to proceed by way of an application for judicial review – see *Trustees of Dennis Rye pension Fund & Anor v. Sheffield City Council* [1997] 4 All ER 749. Further, the substance of the order made against the 4th defendant appears to demand constant supervision and though this may no longer be a complete bar to the grant of a mandatory order, it is nevertheless a relevant consideration that must be kept in the forefront of the judicial mind. In the circumstances of this case, we are unable to see how such a duty as alleged to exist may be enforced in private law proceedings. It follows that this part of the judge's judgment cannot stand. It is set aside.

I think the brief facts in Trustee of Dennis Rye Pension Fund relied on by the Court of Appeal ought to be stated. There, the plaintiffs were served with a repair notice under the Housing Act (UK) requiring work to be carried out to certain houses to render them fit for human habitation. They then applied to the Sheffield City Council for improvement grants under the Local Government & Housing Act. The council approved the application but subsequently refused to pay the grants on the grounds, *inter alia*, that the works had not been completed to its satisfaction. The plaintiffs' commenced private law actions against the council claiming the sums due under the grants. The council contended that if the plaintiffs had any grounds of complaint (which it did not accept), the only appropriate procedure was an application for judicial review and not an ordinary action. It accordingly applied to strike out the plaintiff's claims under RSC O. 18 r.19 and the inherent jurisdiction of the court. The district judge struck out the claims; but the judge allowed the plaintiffs' appeal and dismissed the council's application. The council appealed to the Court of Appeal.

[20] The Court of Appeal presided by Lord Woolf MR held that when performing its role under the Local Government & Housing Act (UK) in relation to the making of grants, a local authority was in general performing public functions which did not give rise to private rights; but once an application for a grant had been approved, a duty to pay it arose on the applicant fulfilling the statutory conditions and that duty would be enforceable by an ordinary action. The court further emphasized that although, in the case before it, there was a dispute as to whether those conditions had been fulfilled, any challenge to the local authority's refusal to express satisfaction would depend on an examination of issues largely on fact – that furthermore, the remedy sought for the payment of a sum of money was not available on an application for judicial review. The court concluded that an ordinary action was the more appropriate and convenient procedure and consequently that the plaintiff's actions were not an abuse of process. The appeal was therefore dismissed.

[21] It is clear that when the speeches by Lord Woolf MR and Pill, LJ are read in their proper perspective, they explicitly recognize that remedies for protecting both private and public rights can be given in private law proceeding and an application for judicial review. It is pertinent to note the observations made by Lord Woolf MR in explaining the seminal decision in *O'Reilly v. Mackman* [1983] 2 AC 237 when he said as follows:

> Where does that leave *O'Reilly v. Mackman* … and what can be done to stop this constant unprofitable litigation over the divide between public and private law proceedings? What I could suggest is necessary to begin by going back to first principles and remind oneself of the guidance which Lord Diplock gave in *O'Reilly v. Mackman*. This guidance involves recognizing (a) that remedies for protecting both private and public rights can be given in both private law proceedings and on an application for judicial review; (b) that judicial review provides, in the interest of the public, protection for public bodies which are not available in private law proceedings (namely the requirement of leave and protection against delay).

Another significant case referred to by Lord Woolf MR was *Roy v. Kensington & Chelsea and Westminster Family Practitioner Committee* [1992] 1 All ER 705, where it was held before a strong bench of law Lords comprising Lords Bridge, Emslie, Griffiths, Oliver and Lowry that although an issue which depended exclusively on the existence of a purely public law right should, as a general rule, be

determined in judicial review proceeding and not otherwise, a litigant asserting his entitlement to a subsisting private law right, whether by way of claim or defence, was not barred from seeking to establish that right by action by the circumstance that the existence and extent of the private right asserted could incidentally involve the examination of a public law issue. It seems apparent from *Roy* that claims in negligence against local authorities could be brought by way of writ action if the claims depend on ordinary tort principles: (see also *Davy v. Spelthorne Borough Council* (184) A (262).

[22] It is in the light of the established principles stated above that the respondents in our case maintain that the Court of Appeal has erred in holding that their only cause of action against MPAJ lay in the area of public law for post-collapse liability. The respondents have relied on ordinary tort principles for their claims of negligence. In this, they are amply supported by established authorities. They should be entitled to file their claims against MPAJ by way of writ action. In this connection, I think it is significant to draw attention to the findings of the learned trial judge on the issue of post-collapse liability. This is reflected in the following passage of his judgment:

> To consider whether the 4th defendant is liable for the acts and/or omissions committed post-collapse, it is necessary to disclose some events that transpired after the collapse of Block I. After the Highland Towers calamity there were efforts by the 4th defendant to stabilize the hillslope on Arab Malaysian land to ensure that no accident of the kind that caused the collapse of Block I would occur to Blocks 2 & 3. In January 1995, there was a briefing called by the 4th defendant which was attended by the 5th defendant and some others. They were told by the 4th defendant that a master drainage plan for the entire area to accommodate all landowners in the vicinity of Highland Towers would be prepared. It was announced that the consultant engaged by the 4th defendant, M/s EEC would be ready with the master drainage plan within three months from the date of briefing. It was obvious that any master drainage plan for the area must cater for the East Stream. It was substantially due to this East Stream not properly attended to that Block I collapsed. In fact, this concern of the East Stream, from the chronology of events as set out, was highlighted by JPS from the very beginning of the development of the Highland Towers project. Thus, the task to incorporate the East Stream into the comprehensive master drainage plan falls upon the 4th defendant who is the body in charge of this watercourse.

A But after a period of one year, there was no sight or news of this plan. After numerous reminders by the 5th defendant of such a plan, the 4th defendant on 29 March 1996 held another briefing. This time, the 4th defendant informed the attendees that a new firm of consultant by the name of KN Associates, was engaged to replace the previous. Again, the 4th defendant gave an assurance that a comprehensive drainage plan of the area would be forth coming with this replacement of consultant. Sad to say, until the time when all evidence for this case was recorded by this court, no comprehensive master drainage plan for the Highland Towers and its surrounding area was adduced by the 4th defendant. In fact, this 4th defendant offered no explanation as to why its promise was not met. These delays had affected the 5th defendant who insist that without a master drainage plan of the area approved and implemented by the 4th defendant, and the retaining walls on their land as well as those on Highland Towers site are corrected or rectified, then very little can be done by anyone to secure the stability of the slope behind Blocks 2 & 3.

It seems clear that after the collapse of Block I, MPAJ had promised or assured the respondents that a master drainage plan for the affected area on the hill slope behind Highland Towers would be formulated and implemented so as to ensure the stability and safety of the adjacent Blocks 2 & 3 occupied by the respondents. The respondents waited in vain for this promise or assurance to materialize. It never came. Their disappointment was echoed by the learned trial judge who said:

> Despite this pressing need and the obvious knowledge of the urgent requirement for a master drainage plan (for otherwise the 4th defendant would not have initiated steps to appoint consultants for this work soon after the collapse of Block I) to secure the stability of the slope so as to ensure the safety of the two apartment blocks, the 4th defendant did nothing after the respective consultants were unable to meet their commitments. The plaintiffs and all other relevant parties are kept waiting because of the 4th defendant.

Quite obviously, there was a failure on the part of MPAJ to formulate and implement the promised master drainage plan. This persisted at the time of the trial before the learned trial judge. Certainly no settlement agreement was in sight at the material time. Not surprisingly, the learned trial judge found negligence on the part of MPAJ. Given the factual circumstances, I tend to agree with him. In my view, MPAJ could not seek shelter in s. 95(2) of Act 133 because this is a case of negligence in failing to formulate and implement certain works or plans and not

negligence in carrying out those works or plans. There was an assumption of responsibility by MPAJ to do what it had promised to do. The respondents alleged that its failure to do so had exposed MPAJ to liability for negligence. The negligence involved a complete absence or failure of works or plans to be done or effected and not with the manner in which the works or plans were being carried out or with the approval and inspection of those works or plans which would have immunized MPAJ from liability for negligence under s. 95(2) aforesaid.

[23] The failure by MPAJ to formulate and implement the master drainage plan had resulted in damages incurred by the respondents who had to evacuate their apartments in Blocks 2 & 3. The elements of forseeability and proximity are clearly discernible from the established facts. Moreover, I do not think it would be in the public interest that a local authority such as MPAJ should be allowed to disclaim liability for negligence committed beyond the expansive shelter of s. 95(2) or other relevant provisions of Act 133 nor would it be fair, just and reasonable to deprive the respondents of their rightful claims under the law. The respondents' claim for negligence by way of writ action is perfectly proper in law. In my view, the Court of Appeal has erred in holding that the respondents' only recourse against MPAJ lay in the area of public law by way of judicial review. I may add that at the time the respondents filed this present action, the public law remedy of judicial review under O. 53 of the Rules of the High Court 1980, did not permit the recovery of damages. Hence, it is not inappropriate for the respondents to proceed by way of writ action which they did. It is therefore in the context discussed above that the question postulated should be answered.

The Settlement Agreement

[24] Before us, the appellant MPAJ has relied on a settlement agreement which was effected between AMFB (the 5th defendant) and the respondents as having the effect of extinguishing its liability to the respondents. It is clear that the proceedings before the High Court and the Court of Appeal were confined to the issue of liability for negligence and nuisance. The High Court found MPAJ to be 15% liable and this was upheld by the Court of Appeal. The said settlement agreement was never part and parcel of the proceedings in the lower courts. As such, it has no bearing on MPAJ's liability to the respondents. It is therefore not relevant for the purpose of this appeal.

Conclusion

[25] Given the answers to the questions postulated and for the reasons stated, it is appropriate to conclude that the appeal by MPAJ is allowed and the cross-appeal by the respondents is also allowed. Costs to the appellant and respondents accordingly. Deposits to be refunded to the successful parties. Finally, let me say, in postscript, that I am greatly indebted to counsel for the parties concerned for their detailed and in-depth research work. They have contributed much to a better understanding and appraisal of the complex issues before the court.

Abdul Hamid Mohamad FCJ:

[26] I have the advantage of reading the judgment of the learned Chief Judge (Sabah & Sarawak). It saves me from having to narrate the background facts as well as having to deal with all the issues raised in the appeal. As I agree with the learned Chief Judge (Sabah & Sarawak) on other issues, I shall only deal with the issue of "post collapse" liability of the appellant ("MPAJ").

[27] However, before going any further there is one point that I would like to make and, that is, regarding the provision of s. 3(1) of the Civil Law Act 1956 which provides:

> 3. (1) Save so far as other provision has been made or may hereafter be made by any written law in force in Malaysia, the Court shall:
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> (a) in West Malaysia or any part thereof, apply the common law of England and the rules of equity as administered in England on the 7th day of April 1956;
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> (b) in Sabah, apply the common law of England and the rules of equity, together with statutes of general application, as administered or in force in England on the 1st day of December 1951;
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> (c) in Sarawak, apply the common law of England and the rules of equity, together with statutes of general application, as administered or in force in England on the 12th day of December 1949, subject however to subsection (3)(ii):
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> Provided always that the said common law, rules of equity and statutes of general application shall be applied so far only as the circumstances of the States of Malaysia and their respective inhabitants permit and subject to such qualifications as local circumstances render necessary.

[28] That provision was legislated, if I may so, by the British one year before the then Malaya obtained her independence and remains the law of this country for half a century now. Whatever our personal views about it, it is the law and no court can ignore it.

[29] That provision says (I am only referring to common law) that the court shall apply the common law of England as administered of England on the given dates provided that no provision has been made or may hereafter be made by any written law in force in Malaysia. Even then, it is further qualified that it is only applicable so far only as the circumstances of the States of Malaysia and their respective inhabitants permit and subject to such qualifications as local circumstances render necessary.

[30] Strictly speaking, when faced with the situation whether a particular principle of common law of England is applicable, first, the court has to determine whether there is any written law in force in Malaysia. If there is, the court does not have to look anywhere else. If there is none, then the court should determine what is the common law as administered in England on 7 April 1956, in the case of West Malaysia. Having done that the court should consider whether "local circumstances" and "local inhabitants" permit its application, as such. If it is "permissible" the court should apply it. If not, in my view, the court is free to reject it totally or adopt any part which is "permissible", with or without qualification. Where the court rejects it totally or in part, then the court is free to formulate Malaysia's own common law. In so doing, the court is at liberty to look at other sources, local or otherwise, including the common law of England after 7 April 1956 and principles of common law in other countries.

[31] In practice, lawyers and judges do not usually approach the matter that way. One of the reasons, I believe, is the difficulty in determining the common law of England as administered in England on that date. Another reason which may even be more dominant, is that both lawyers and judges alike do not see the rational of Malaysian courts applying "archaic" common law of England which reason, in law, is difficult to justify. As a result, quite often, most recent developments in the common law of England are followed without any reference to the said provision. However, this is not to say that judges are not aware or, generally speaking, choose to disregard the provision. Some do state clearly

in their judgments the effects of that provision. For example, in *Syarikat Batu Sinar Sdn. Bhd. & 2 Ors. v. UMBC Finance Bhd. & 2 Ors.* [1990] 2 CLJ 691; [1990] 3 CLJ (Rep) 140 Peh Swee Chin J (as he then was) referring to the proviso to s. 3(i) said:

> We have to develop our own Common law just like what Australia has been doing, by directing our mind to the "local circumstances" or "local inhabitants".

[32] In *Chung Khiaw Bank Ltd. v. Hotel Rasa Sayang* [1990] 1 CLJ 675; [1990] 1 CLJ (Rep) 57 the Supreme Court, *inter alia*, held:

> (4) Because the principle of common law has been incorporated into statutory law as contained in s. 24 of the Contracts Act 1950, the trend on any change in the common law elsewhere is not relevant. Any change in the common law after 7 April 1956 shall be made by our own courts.

[33] In the judgment of the court in that case, delivered by Hashim Yeop A. Sani CJ (Malaya), the learned Chief Justice (Malaya), said:

> Section 3 of the Civil Law Act 1956 directs the courts to apply the common law of England only in so far as the circumstances permit and save where no provision has been made by statute law. The development of the common law after 7 April 1956 (for the States of Malaya) is entirely in the hands of the courts of this country. We cannot just accept the development of the common law in England. See also the majority judgments in *Government of Malaysia v. Lim Kit Siang* ([1988] 2 MLJ 12 – added).

[34] That case is an example where our statute has made specific provisions incorporating the principles of common law of England. However, it shows the effect on the application of the common law in England. In the instant appeal, we are dealing with a situation where no statutory provisions have been made.

[35] In *Jamal bin Harun v. Yang Kamsiah & Anor* [1984] 1 CLJ 215; [1984] 1 CLJ (Rep) 11 (PC) a "running down" case in which the issue of itemization of damages was in question, Lord Scarman, delivering the judgment of the Board, *inter alia*, said:

> Their Lordships do not doubt that it is for the courts of Malaysia to decide, subject always to the statute law of the Federation, whether to follow English case law. Modern English authorities may be persuasive, but are not binding. In determining whether to accept their guidance the courts will have regard to the

> circumstances of the states of Malaysia and will be careful to apply them only to the extent that the written law permits and no further than in their view it is just to do so.

[36] As early as 1963, this provision had been criticised. Professor L.C. Green, in an article *"Filling Lacunae in the Law"* [1963] MLJ xxviii, commented:

> Apart from any problem that might arise from the fact that this legislation attempts, to some extent at least, to introduce a supplementary English common law or equity which may have become out of date and which may no longer be applicable in England, the situation in Malaysia and Singapore is today different from what it was at the time of the enactment of the Ordinances. In view of the increased political stature of the two territories, an in anticipation of further changes likely to be effected with the establishment of Malaysia, it is now perhaps evidence of an out of date attitude as well as contrary to national prestige to make provisions for the supplementation of the local law in the event of lacunae by means of reference to any "alien" system, whether it be that of the former imperial power or not.

[37] It is not the function of the court to enter into arguments regarding the desirability or otherwise of the provision. That is a matter for Parliament to decide. As far as the court is concerned, until now, that is the law and the court is duty bound to apply it. In so doing, the provision is clear that even the application of common law of England as administered in England on 7 April 1956 is subject to the conditions that no provision has been made by statute law and that it is "permissible" considering the "circumstances of the States of Malaysia" and their "respective inhabitants". That is not to say that post–7 April 1956 developments are totally irrelevant and must be ignored altogether. If the court finds that the common law of England as at 7 April 1956, is not "permissible", it is open to the court to consider post-7April 1956 developments or even the law in other jurisdictions or sources.

[38] The point I am making, if I may borrow the words of Hashim Yeop A. Sani, Chief Justice (Malaya) in *Chung Khiaw Bank Ltd. (supra)* is that "We cannot just accept the development of the common law of England". We have to "direct our mind to the "local circumstances" or "local inhabitants"," to quote the words of Peh Swee Chin J in *Syarikat Batu Sinar Sdn. Bhd. & 2 Ors (supra)*

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Claim For Post-collapse Economic Loss

[39] As I agree with the Chief Judge (Sabah & Sarawak) that s. 95(2) protects MPAJ from claims for pre-collapse period, it is not necessary for me to discuss the issue. So, I shall confine myself to the post-collapse period.

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[40] The High Court had found MPAJ liable for the post-collapse period and that s. 95(2) of the Street, Drainage & Building Act 1974 ("S, D & B Act 1974") does not cover MPAJ. The Court of Appeal reversed that finding purely on the ground that it is a matter under public law and not private law. The learned Chief Judge (Sabah & Sarawak) disagreed with the Court of Appeal and held that the claim could be made under private law as well. While I agree with his finding of law, in my view, since the Court of Appeal merely "assumes" that MPAJ was liable for post-collapse period, this Court should go one step further and decide whether on the facts, MPAJ should be held liable for the pure economic loss suffered by the respondents/plaintiffs. In this respect, I shall confine my discussions to the liability of MPAJ, a local authority, for economic loss suffered by the respondents for its failure to take remedial actions after the collapse of Block 1.

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[41] The judgment of the High Court on this point is rather brief. This is what the learned judge said:

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> To consider whether the 4th (MPAJ – added) defendant is liable for the acts and/or omissions committed post-collapse, it is necessary to disclose some events that transpired after the collapse of Block 1. After the Highland Towers calamity there were efforts by the 4th defendant to stabilize the hill slope on Arab Malaysian Land to ensure that no accident of the kind that caused the collapse of Block 1 would occurred *(sic)* to Block 2 & 3. In January 1995, there was a briefing called by the 4th defendant which was attended by the 5th defendant and some others. They were told by the 4th defendant that a master drainage plan for the entire area to accommodate all landowners in the vicinity of Highland Towers would be prepared. It was announced that the consultant engaged by the 4th defendant, M/s EEC would be ready with the master drainage plan within 3 months from date of the briefing. It was obvious that any master drainage plan for the area must cater for the East Stream. It was substantially due to this East Stream not properly attended to that Block 1 collapsed. In fact this concern of the East Stream, from the chronology of events as set out, was highlighted by JPS from the

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very beginning of the development of the Highland Towers Project. Thus the task to incorporate the East Stream into the comprehensive master drainage plan falls upon the 4th defendant who is the body in charge of this watercourse.

But after a period of 1 year there was no sight or news of this plan. After numerous reminders by the 5th defendant of such a plan, the 4th defendant on the 29.3.1996 held another briefing. This time, the 4th defendant informed the attendees that a new firm of consultant, by the name of K.N. Associates, was engaged to replace the previous. Again the 4th defendant gave an assurance that a comprehensive drainage plan of the area would be forth coming with this replacement of consultant. Sad to say, until the time when all evidence for this case was recorded by this Court, no comprehensive master drainage plan for the Highland Towers and its surrounding area was adduced by the 4th defendant. In fact this defendant offered no explanation as to why its promise was not met. These delays had affected the 5th defendant who insists that without a master drainage plan of the area approved and implemented by the 4th defendant, and the retaining walls on their land as well as those on Highland Towers Site are corrected or rectified, then very little can be done by anyone to secure the stability of the slope behind Block 2 & 3.

Despite this pressing need and the obvious knowledge of the urgent requirement for a master drainage plan (for otherwise the 4th defendant would not have initiated steps to appoint consultants for this work soon after the collapse of Block 1) to secure the stability of the slope so as to ensure the safety of the 2 apartment blocks, the 4th defendant did nothing after the respective consultants were unable to meet their commitments. The plaintiffs and all other relevant parties are kept waiting because of the 4th defendant. This is certainly inexcusable and definitely a breach of the duty of care owed by the 4th defendant to the plaintiffs for not even fulfilling its obligation towards maintenance of the East Stream. For this I find the 4th defendant liable to the plaintiffs for negligence.

Lastly, the plaintiffs have also alleged that the 4th defendant failed to take any action against the Tropic in clearing the 5th defendant's land. I shall be elaborating in detail the acts of Tropic when I analyze the position of the 5th defendant and Tropic. For the present moment, suffice me to say that I do not consider the 4th defendant liable to the plaintiffs in respect of the action committed by Tropic.

As for the claim of the plaintiffs on the 4th defendant for failing to prevent vandalism and theft to Block 2 & 3, I allow it and my reasons will be intimated in the later part of this judgment.

Analysis – Nuisance

> By the acts and/or omissions of the 4th defendant elaborated above, I also find that the 4th defendant is an unreasonable user of its land in failing to maintain the East Stream post collapse which is under its care. Its acts and or omissions are foreseeable to cause a damage to the plaintiffs – its neighbour. For this, I find the 4th defendant is also liable to the plaintiffs for nuisance.

[42] The sum total of it all is the failure of MPAJ to fulfill its promise to come up with and implement the master drainage plan. As found by the learned judge, there were efforts made by MPAJ to stabilize the hill slope on Arab Malaysian Land to ensure that no accident of the kind that caused the collapse of Block 1 would occur to Blocks 2 & 3. A consultant was engaged to prepare a master drainage plan. After a year and no such plan was produced, a new consultant was appointed to prepare the same. Yet it never materialized. It is for this reason that the learned Judge found MPAJ liable for negligence to the plaintiffs.

[43] It must be clarified that here I am only concerned with the failure or delay on the part of MPAJ to come up with and to implement a master drainage plan in an effort to stabilize the hill slope on the Arab Malaysian Land.

[44] The question is, does this failure or delay amount to actionable negligence against a public authority, the MPAJ, for pure economic loss?

[45] Let us now look at cases decided by Malaysian courts on pure economic loss. First the case of *Kerajaan Malaysia v. Chuah Fong Shiew* [1993] 2 MLJ 439. In that case, the plaintiff claimed damages resulting from the negligence of the defendants in superintending and supervising buildings constructed for the plaintiff by Sri Kinabalu Sdn. Bhd. All the defendants were employees or agents of the consultant firm, Sigoh Din Sdn. Bhd., which was responsible for superintending and supervising the construction. The plaintiff alleged that all the three defendants had failed to carry out their duties to superintend and supervise the construction, causing the plaintiff to suffer substantial losses in repairing the buildings in order to make them safe for occupation. The third defendant applied to strike out the plaintiff's action under O. 18 r. 19 of the Rules of the High Court 1980 ("RHC 1980"). The senior assistant registrar struck out the action against the third defendant. The plaintiff appealed to the judge-in-chambers. The learned judge dismissed the appeal.

[46] Very interesting arguments were forwarded by learned counsel for both parties including the effect of s. 3 of the Civil Law Act 1956, the issue of public policy and exception to *Hedley Byrue & Co. Ltd. & Partners Ltd.* [1964] 2 All ER 575.

[47] Unfortunately, the judgment proper is rather brief. On economic loss, the learned judge merely said:

> (3) Kerugian yang dialami oleh plaintif adalah kerugian atau kehilangan ekonomi tulen (pure economic losses), dan defendan ketiga tidak boleh dikenakan tanggungan (liability) di bawah tort di atas kerugian yang dialami oleh plaintif dalam kes ini oleh kerana tiada siapapun yang cedera atau tiada harta kepunyaan orang lain rosak akibat daripada perbuatan atau salahlaku oleh defendan ketiga. Keputusan yang dibuat oleh Dewan Pertuanan (House of Lords) dalam kes *Murphy v. Brentwood DC* dan lain-lain kes lagi yang membuat keputusan yang sama, adalah sangat munasabah, berpatutan dan sepatutnya diterima sehingga bila-bila masapun. Mahkamah di negara ini menerima keputusan dan pendapat itu dan tiada kemungkinan membuat pendapat yang berlainan, walaupun apa yang dikatakan oleh peguam pihak plaintif bahawa keadaan di Malaysia berlainan dengan keadaan di United Kingdom. Hakim dalam kamar ini juga berpendapat bahawa adalah tidak berpatutan dan tidak munasabah jika pekerja-pekerja, termasuk juga pekerja-pekerja mahir yang bekerja di bawah seseorang atau syarikat pemborong binaan, bertanggungan (liable) kepada tuan ampunya bangunan yang berkenaan di atas kecuaian yang membawa kepada ketidaksempurnaan bangunan yang berkenaan asalkan ianya tidak menyebabkan kecederaan kepada diri seseorang atau harta benda orang lain.

[48] Two years later, as a High Court Judge, I had occassion to decide the case of *Nepline Sdn. Bhd. v. Jones Lang Wootton* [1995] 1 CLJ 865. In that case, a firm of registered real estate agents and chartered valuer was sued for damages for failure to disclose the fact to the appellant (tenant) that the premises was subject to "a foreclosure proceeding then pending in court". The court made an order for sale of the said premises and the appellant demanded the return of the deposit. The respondent contended that it was a case of mere omission and not a positive statement made by the respondent and that the claim was for pure economic loss. It is in that case that I took the approach mentioned earlier in this judgment. I then tried to determine the common law of England on the subject as on 7 April 1956, and then considered the provision to s. 3(1) of the Civil Law Act 1956. This is what I had said then:

A I therefore ask the question whether local circumstances would require the respondent, an estate agent, a professional who advertised premises for rent, who knew that the premises was a subject matter of a pending foreclosure action, to owe a duty of care to the appellant, who answered to the advertisement and subsequently entered into a tenancy agreement for a period of two
B years, to disclose the fact that the premises was subject to a pending foreclosure action?

I do not have the slightest doubt that the answer should be in the affirmative.

C This is not a case of a friend telling another friend that there is a house for rent. This is a case of a professional firm, holding out to be a professional with expertise in its field, earning its income as such professional. They know that people like the appellant would act on their advice. Indeed, I have no doubt that they
D would hold out to be experts in the field and are reliable. It would be a sad day if the law of this country recognises that such a firm, in that kind of relationship, owes no duty of care to its client yet may charge fees for their expert services.

In the circumstances, I think I am fully justified in taking the
E view that the defendant in this case owed a duty to the plaintiff to disclose that there was a foreclosure proceeding pending. I think the provision of s. 3 of the Civil Law Act 1956, especially the proviso thereto, allows me to do so.

F Learned Counsel for the respondent, referring to numerous texts and authorities, stressed the need for some control mechanism narrower than the concept of reasonable foreseeability to limit a person's liability for pure economic loss. He argued, correctly I must says, that subsequent to Anns's case there are a number of cases, including Caparo which steered clear of it and were termed
G as the "retreat from *Anns*'s cases."

First, I must say that I agree with him that the claim in the present case (for the refund of the deposit paid) is for pure economic loss. It is not for an injury to person or property.

H Secondly, generally speaking, I also agree that there is a need to limit recoverability of damages for pure economic loss.

The reasons for judicial reluctance to impose liability in such cases are conveniently listed by R.P. Balkin and J.L.R. Davis in the *Law of Torts* from pp. 421 to 424. These are:

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(i) the fear of indeterminate liability;

(ii) disproportion between defendant's blameworthiness and the extent of his liability;

(iii) interrelationship between liability in tort and contract;

(iv) the need for certainty; and

(v) the effect of insurance.

Considering these factors, it is a wise policy to limit liability in pure economic loss cases, generally speaking.

However, I am of the view that such fears do not arise in this case. Here the amount claimed is definite. It is a definite amount which had been paid by the appellant. It is that amount only which the appellant now seeks to recover. So, even using the two tests which learned counsel for the respondent urged me to apply, I think, on the facts of this case, the respondent is liable.

[49] My record shows that appeal to the Court of Appeal (Court of Appeal Civil Appeal No. 4-90-95) was dismissed on 6 January 1997. Unfortunately there is no written judgment of the Court of Appeal.

[50] In the same year *Teh Khem On & Anor v. Yeoh & Wu Development Sdn. Bhd. & Ors.* [1996] 2 CLJ 1105 was decided by Peh Swee Chin J (as he then was). In that case, the plaintiffs claimed against the first defendant ("the builder") in contract for defective works in the construction of the house purchased by the plaintiffs. They also claimed against the second defendant ("the architect") and the third defendant ("the engineer") for damages in negligence. The learned judge found the builder liable for breach of contract but dismissed the claim against the architect and the engineer with whom the plaintiffs had no contractual relationship, the claim being for pure economic loss. The learned judge discussed at length the development in England (and mentioning also the attitude of the courts in Australia and New Zealand) up to *Murphy v. Brentwood District Council* [1990] 2 All ER 908.

[51] In *Pilba Trading & Agency v. South East Asia Insurance Bhd & Anor* [1999] 8 CLJ 403, the appellant ("the insured") sent a damaged car for repair at a workshop appointed by the respondent ("the insurer"). There was a long delay at the workshop. As a result, the insured incurred expenses in hiring an

alternative vehicle for which the insured claimed in tort of negligence. Muhammad Kamil J dismissed the claim on the ground, inter alia, that "the alleged loss was pure economic loss. It was a financial or pecuniary loss and did not involve any physical damage or danger of physical damage to the property of the appellant. It was quite distinct from cases of economic loss involving physical damage. The established legal position in regard to this is to preclude such claims even where foreseeable. The courts have always been reluctant to extend the law of negligence to claim of foreseeable economic loss."

[52] The learned judge also reviewed judgments of the courts in England right up to *Caparo Industries plc v. Dickman & Ors.* [1990] 1 All ER 568

[53] In 1996, James Foong J (as he then was) decided the case of *Dr. Abdul Hamid Abdul Rashid & Anor v. Jurusan Malaysia Consultants (sued as a firm) & Ors.* [1999] 8 CLJ 131. In that case, the plaintiff had hired the first defendant, an engineering firm, to construct a double storey house. The plans were signed by the fourth defendant, the proprietor of the first defendant who was a registered engineer. The building plans were approved by the second defendant, the local council. About three and a half years after the handing over of the house to the plaintiff the house began to collapse due to landslide and the plaintiff had to evacuate the house. The plaintiffs claims against the first, fourth and fifth defendants were founded on contract and tort. Their claim against the second defendant (the local council) was based on negligence and breach of statutory duties. The cause of action against the third defendant was based on negligence, nuisance and the rule of *Rylands v. Flether.*

[54] The court allowed the plaintiffs' claim against the first, third and fourth defendants but dismissed the claim against the second and fifth defendants. The learned judge, *inter alia,* held:

> (3) A claim for pure economic loss can be entertained in an action for negligence. Non-allowance of such claim would leave the entire group of subsequent purchasers in this country without relief against errant builders, architects, engineers and related personnel who are found to have erred. If there is any fear that this approach may encumber the local authorities to pay out substantial claims due to their negligence in granting approvals or inspecting building works, there is s 95 of the Street, Drainage and Building Act 1974 which prohibits such authorities to be sued.

[55] The learned judge, in his judgment, reviewed judgments of the courts in England, Australia, New Zealand, Canada and Singapore besides the judgment of Peh Swee Chin J mentioned earlier. The learned judge distinguished *Murphy (supra)*, followed the Canadian case of *Winnipeg Condominium Corp. No. 36 v. Bird Construction Co. Ltd. & Ors* [1995] 121 DLR (4th edn.) 193, the Australian case *Sutherland Shire Council v. Heyman & Anor* [1985] 157 CLR 424; 60 ALR 1, the Singapore case of *RSP Architects Planniners & Engineers v. Ocean Front Pte Ltd. & Anor Appeal* [1996] 1 SLR 113, but did not follow Pek Swee Chin's judgment in *Teh Khew On & Anor (supra)*.

[56] However, this case *(Dr. Abdul Hamid Abdul Rashid, supra)* was overruled by the Court of Appeal in the instant case.

[57] So, we see that, so far, there had only been a few judgments of Malaysian courts and all are at High Court level. In three of the cases, *Kerajaan Malaysia (supra)*, *Teh Khew On (supra)* and *Pilba Trading (supra)*, the learned judges appear to have dismissed the claims for pure economic loss because there were no injuries to person or property. Of the two that allowed the claim, I had in *Nepline Sdn. Bhd. (supra)* allowed it after resorting to the proviso to s. 3(1) of the Civil Law Act 1959, following and indeed extended *Hedley Byrue (supra)* on the basis that there was fiduciary relationship between the parties. James Foong J, in *Dr. Abdul Hamid Abdul Rashid (supra)*, appears to base his decision to allow economic loss on his concern that otherwise "the entire group of subsequent purchases in this country (would be left) without relief against errant builders, architects, engineers and related personnel who are found to have erred." However, this case was overruled by the Court of Appeal in the instant case.

[58] So, it appears that until today *Nepline Sdn. Bhd. (supra)* is the only case in which the Court of Appeal has confirmed the judgment of the High Court in a claim for economic loss, though without a written judgment.

[59] Now, reflecting on my own judgment in *Nepline Sdn. Bhd. (supra)* delivered ten years ago, I am afraid I am still of the same view regarding the approach that the court has to take in view of s. 3(1) of the Civil Law Act 1956, the effect of the provision and the proviso thereto and the decision to accept claims for pure economic loss in negligence in limited cases, considering the local circumstances. However, I shall not venture to say where the line

should be drawn. It may be said that this will lead to uncertainly in the law. The answer to that is that this whole area of common law itself is fraught with uncertainty.

[60] I shall now return to the issue under discussion in the instant appeal: whether MPAJ is liable for the economic loss suffered by the plaintiffs for failure (so far) to do what it had promised to do to alleviate the loss suffered by the respondents after the collapse of Block 1 and evacuation of Blocks 2 and 3. We are actually dealing with the failure on the part of MPAJ to promptly and effectively carry out the drainage master plan that it promised to do. And, we are dealing with a local authority. I am confining my judgment to that factual situation alone.

[61] Even the Privy Council, sitting in England hearing an appeal from New Zealand had in mind the "local policy considerations" in applying the common law of England. This can be seen in *Invercargill City Council v. Hamlin* [1996] 1 All ER 756, a case concerning the duty of care of the local authority in New Zealand over the negligence of its Inspector in approving defective foundations causing damage to the house in question. The headnote summarises the views of the Privy Council as follows:

> Held – The appeal would be dismissed for the following reasons:
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> (1) The New Zealand Court of Appeal was entitled to develop the common law of New Zealand according to local policy considerations in areas of the common law which were developing, not settled. The law of negligence in relation to a local authority's liability for the negligence of a building inspector was particularly unsuited to a single solution applicable in all common law jurisdictions regardless of differing local circumstances. The perception in New Zealand was that community standards and expectations demanded the imposition of a duty of care on local authorities and builders alike to ensure compliance with local byelaws and the Court of Appeal had, in common with other common law jurisdictions, built up a line of authority based on the linked concepts of control by the local authority of building works through the enforcement of its byelaws and reliance on that control by purchasers. The present case had been decided in accordance with that line of authority and therefore on the duty of care issue the Board would indorse in relation to New Zealand the approach taken by the New Zealand courts, notwithstanding House of Lords authority to the contrary (see p 764 h to p 765 a, p 766 j to p 767 c f g, p 768 c and p 773 c, post); dictum of Lord Diplock in

Cassell & Co. Ltd. v. Broome [1972] 1 All ER 801 at 871 applied; *Bowen v. Paramount Builders (Hamilton) Ltd* [1977] 1 NZLR 394 and *Kamloops (City) v. Nielsen* [1984] 10 DLR (4th) 641 followed; *D & F Estates Ltd v. Church Comrs for England* [1988] 2 All ER 992 and *Murphy v. Brentwood DC* [1990] 2 All ER 908 not followed.

[62] In that case, the court in New Zealand went even further than the courts in England on the issue of duty of care of a local council. Yet, the Privy Council declined to interfere considering the "local policy consideration" and "differing local circumstances" in New Zealand.

[63] We will also remember the views expressed by the Privy Council in relation to Malaysia quoted earlier.

[64] So, it is in this light that I shall consider the issue now under discussion.

[65] I shall not enter into the discussion whether the "categorization approach" or the "open-ended approach" should be accepted by the courts in this country. That has been sufficiently dealt with by the learned Chief Judge (Sabah & Sarawak). After all, as correctly stated by learned Chief Judge (Sabah & Sarawak), the two approaches do not exist in strict water tight compartments. It is possible for them to overlap.

[66] Even if we accept that the question is not the nature of the damage itself, whether physical or percuniary, but whether the scope of the duty of care in the circumstances of the case is such as to embrace damage of the kind suffered by the plaintiffs, there is the additional factor to be considered ie, whether it is fair, just and reasonable to impose such a duty. This is where public policy and local circumstances come into consideration: In *Caparo Industries plc v. Dickman* [1990] 1 All ER 568 (HL) at p. 573 to 574, Lord Bride said:

> What emerges is that, is addition to the foreseeability of damage, necessary ingredients in any situation giving rise to a duty of care are that there should exist between the party owing the duty and the party to whom it is owed a relationship characterised by the law as one of 'proximity' or 'neighbourhood' and that the situation should be one *in which the council considers it fair, just and reasonable that the law should impose a duty of a given scope on the party for the benefit of the other.* (emphasis added).

[67] The question then is, considering the public policy and local circumstances, is it fair, just and reasonable to impose a liability on MPAJ, a local authority, for pure economic loss to the plaintiffs for its failure (so far) to come up with and implement the promised drainage master plan or to stabilize the hill slop on Arab Malaysian Land to ensure that no accident of the kind that caused the collapse of Block 1 would occur to Blocks 2 and 3?

[68] A local council is establish with a host of duties to perform, from providing and maintaining recreational areas and collecting garbage to providing public transport, homes for the squatters, temporary homes in case of disasters, natural or otherwise, and so on. Indeed, the list is endless. The expectations of residents are even more. These are public duties to all residents or ratepayers within the council's geographical limit. To finance all their activities, local authorities depend mainly on assessment rates and fees for licences. In a democracy as in Malaysia and the kind of attitude of the people, we know too well how difficult it is to increase the rates or the fees even by a few percent. With limited resources and manpower, even if it tries its best (and generally speaking, I say they do) to provide the infrastructure and services, it will not satisfy everybody. People's demands far outweigh their contributions. When services are provided or as a result of infrastructural improvements, the value of their properties goes up, as usually happen, it is taken for granted, as their rights, their good fortune or business acumen. Then there is the attitude of the public from littering and vandalism to resorting to irresponsible means in order to maximise profits, as we see in the facts of this case as narrated by the learned High Court Judge.

[69] With limited resources and manpower local councils would have to have their priorities. In my view, the provision of basic necessities for the general public has priority over compensation for pure economic loss of some individuals who are clearly better off than the majority of the residents in the local council area. Indeed, the large sum required to pay for the economic loss, even if a local council has the means to pay, will certainly deplete whatever resources a local council has for the provision of basic services and infrastructure. Projects will stall. More claims for economic loss will follow. There may be situations where a local council, which may only be minimally negligent, may be held to be a joint tortfeasor with other tortfeasors, which may include irresponsible developers, contractors and professionals. There is no way to execute the judgments against them. Out of necessity or for

convenience, the judgment for the full amount may be enforced against the local council. The local council may go bust. Even if it does not, is it fair, just and reasonable that the taxpayers' money be utilised to pay for the "debts" of such people? In my view, the answer is "No". A

[70] I do not think that we can compare the "local circumstances" in New Zealand, for example, with the "local circumstances" in Malaysia now, be it in terms of development (many Malaysian, though it may not in the MPAJ locality, are still without water supply and electricity), civic mindedness of, and compliance with laws and bylaws by the general public or, as we see in this case, even by developers, and others. I do not think that, in the present circumstances, on the facts and in the circumstances of this case, it is fair, just and reasonable to impose such a burden on MPAJ or other local councils in this country in similar situations. B C D

[71] For the same reasons too, the claim for loss due to vandalism and theft by the respondents which was allowed by the learned trial judge should not be allowed. Vandalism follows every disaster, natural or otherwise, in undeveloped, developing or most developed countries. Recent event shows that even the most powerful military and the best equipped police force in the richest and most developed country in the world were also unable to prevent it. Even we ourselves cannot ensure that our own houses will not be broken into. I do not think it is fair, just and reasonable to hold MPAJ liable for it. E F

[72] The discussion in this judgment covers nuisance as well.

[73] So, while I agree with the answers given by the learned Chief Judge (Sabah & Sarawak) on other questions, on pure economic loss, my answer to question No. 3 is as follows: G

[74] While economic loss under limited situations may be allowed, Malaysian courts will have to consider the effects of s. 3 of the Civil Law Act 1956 and, considering the "public policy" and the "local circumstances", whether it is fair, just and reasonable to allow it on the facts and in the circumstances of the case. H

[75] I would therefore allow MPAJ's appeal with costs here and in the courts below and order that the deposit be refunded. Regarding the cross-appeal by the respondents, even though, as a matter of law, I agree with the learned Chief Judge (Sabah & I

A Sarawak) who disagrees with the Court of Appeal on the question of the dichotomy between public law and private law, in the light of my judgment on the pure economic loss issue, I would dismiss it. However, on the cross-appeal, I would order that each party pays its own costs and that the deposit be refunded to the
B respondents.

Arifin Zakaria FCJ:

[76] I have had the advantage of reading in draft the judgments
C of the learned Chief Judge (Sabah & Sarawak) and that of my learned brother Abdul Hamid Mohamad, FCJ and for the reasons he gives I agree with the learned Chief Judge (Sabah & Sarawak) on all the issues before this court except on the issue of "post collapse" liability. On the "post collapse" liability, for the reasons
D he gives, I agree with the view of my learned brother Abdul Hamid Mohamad, FCJ.

[77] In the circumstances, I would therefore allow the appeal by Majlis Perbandaran Ampang Jaya with costs here and in the courts below and order that the deposit be refunded. On the
E cross appeal by the respondents I would dismiss the same but order that each party bears its own costs and the deposit be refunded to the respondents.

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